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Ooi Chee Seong & Anor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS P-05–259 OF 2010 AND P-05–260 OF 2010
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
25 MARCH 2014

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused persons charged for three charges of trafficking in dangerous drugs — Sentenced to death — Drugs found in condominium unit — Condominium unit entered by force — Accused persons found inside condominium unit — Drugs and paraphernalia of making drugs recovered — Whether drugs belonged to accused persons — Whether defence case probable

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Evidence — Witness — Failure of prosecution to call witness — Drugs found in condominium unit — Accused persons' defence that drugs did not belong to them — Owner of condominium unit not called as witness — Whether detrimental to prosecution case

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The appellants were tried before the High Court for three charges of trafficking in dangerous drugs. SP7 had led a police party to a condominium unit entered the unit by force. Once inside, SP7 noticed that there was no one inside the condominium unit and that the front room was locked. SP7 then fired three shots at the door knob and forced it open. The door was opened but no one was inside. SP7 and his police personnel then proceeded to the back rooms through a passage and at that juncture, the appellants were seen running towards one of the back rooms. The appellants were then arrested. A search was conducted in the kitchen area and some illegal items were recovered from the kitchen cabinets. The master bedroom was searched next and there was an assortment of paraphernalia for drugs processing suspected to be heroin. Both the appellants testified that they were friends and that they went to the condominium unit together on that fateful day upon receiving the invitation of a person named Ang. At that time, Ang was alone but a short while later, Ang received a telephone call and proceeded to leave the appellants. The appellants remained in the hall watching television when they heard sounds of the main door being forced open followed by three or four sounds of explosions. The two became frightened and decided to take cover but armed men came rushing over and arrested them. Both the appellants denied any connection with the drugs found in the condominium unit. At the end of the defence case, the High Court judge found both the appellants guilty in respect of all the three charges and sentenced them to death. In the present appeal, two main issues raised were

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that the High Court judge failed to appreciate that the prosecution's failure to call or offer Ang and Chew had compromised the case for the prosecution; and that the High Court judge erred in failing to sufficiently consider the defence case.

Held, allowing the appeal:

(1) It was not disputed that Ang existed and that he was a real person and not a fictitious character. Ang was arrested on the same day the appellants were arrested. It was this aspect of the case that the High Court judge failed to appreciate. His Lordship was bound to objectively view the whole case from all angles so that both the appellants have a fair chance of being acquitted (see paras 33 & 40).

(2) In order to establish its case beyond reasonable doubt, the prosecution must proceed to disprove or negate the appellants' version. In order to disprove or negate the appellants' version, the prosecution must call Ang to afford him the opportunity to rebut and deny that he was the occupier of the condominium unit. If called, Ang too would be able to break the nexus that the drugs found in the condominium unit belonged to him. Viewed from these perspectives, the omission by the prosecution to call Ang was fatal (see para 44).

(3) Chew was an important witness. He was the tenant of the condominium unit based on the tenancy agreement. It must be recalled that the first appellant testified that Ang had introduced Chew to him once at the condominium unit. Thus, it was incumbent on the part of the prosecution to call Chew or to offer Chew to the defence. This was not done and it had seriously compromised the case for the prosecution (see para 55).

(4) The High Court judge had imposed a higher burden in law to the detriment and disadvantage of both the appellants. The findings of the learned High Court judge coupled with the available evidence adduced by the prosecution showed that both the appellants were present in the condominium unit and their damning conduct of flight was highlighted. The conduct of flight, in the context of the present appeal, even if true, could be construed as a natural reaction of pure panic bearing in mind that three or four shots were fired by the police personnel in an attempt to gain entry into the condominium unit (see paras 65–66).

[Bahasa Malaysia summary

Perayu-perayu dibicarakan di hadapan Mahkamah Tinggi untuk tiga tuduhan mengedar dadah berbahaya. SP7 membawa pasukan polis ke pangsapuri dan memasuki unit tersebut dengan memecahkan pintu. Apabila berada di dalam unit tersebut, SP7 mendapati tiada seorang pun di dalam unit pangsapuri dan bahawa pintu bilik hadapan dikunci. SP7 kemudiannya melepaskan tiga

tembakan ke arah tombol pintu dan membukanya secara paksa. Pintu terbuka dan tiada orang di dalamnya. SP7 dan pegawainya kemudian terus ke bilik-bilik belakang melalui laluan dan pada ketika itu, perayu-perayu dilihat lari ke arah salah satu bilik belakang. Perayu-perayu kemudiannya ditangkap. Pemeriksaan dijalankan di kawasan dapur dan beberapa barang haram telah ditemui daripada kabinet dapur. Bilik tidur utama diperiksa selepas itu dan terdapat pelbagai jenis kelengkapan untuk memproses dadah disyaki heroin. Kedua-dua perayu memberi keterangan bahawa mereka adalah kawan dan mereka pergi bersama-sama ke pangsapuri unit pada hari malang tersebut selepas menerima jemputan daripada seorang yang bernama Ang. Pada masa tersebut, Ang bersendirian tetapi tidak lama kemudian, Ang menerima panggilan telefon dan terus meninggalkan perayu-perayu. Perayu-perayu duduk di ruang tamu menonton televisyen apabila mereka mendengar bunyi pintu utama dipecah diikuti dengan tiga atau empat letupan. Kedua-dua mereka takut dan mengambil keputusan untuk bersembunyi tetapi lelaki-lelaki bersenjata meluru masuk dan menangkap mereka. Kedua-dua perayu menafikan apa-apa hubungan dengan dadah yang dijumpai di dalam unit pangsapuri tersebut. Pada akhir kes, hakim Mahkamah Tinggi mendapati kedua-dua perayu bersalah berkaitan ketiga-tiga tuduhan dan menjatuhkan hukuman mati. Dalam rayuan ini, dua isu utama dibangkitkan bahawa hakim Mahkamah Tinggi gagal untuk menilai bahawa kegagalan pihak pendakwaan untuk memanggil atau menawar Ang dan Chew telah mengkompromi kes untuk pihak pendakwaan; dan bahawa hakim Mahkamah Tinggi gagal untuk secara mencukupi mempertimbangkan kes pembelaan.

Diputuskan, membenarkan rayuan:

(1) Ia tidak dipertikaikan bahawa Ang wujud dan dia adalah 'real person' dan bukan karakter yang direka. Ang ditangkap pada hari yang sama perayu-perayu ditangkap. Adalah pada aspeks bahagian kes ini hakim Mahkamah Tinggi gagal untuk membuat penilaian. Yang Arif terikat untuk secara objektif mengambil kira kes secara keseluruhan dari semua sudut agar kedua-dua perayu mempunyai peluang adil untuk dibebaskan (lihat perenggan 33 & 40).

(2) Untuk dapat membuktikan kesnya melampaui keraguan munasabah, pihak pendakwaan mesti meneruskan untuk membuktikan atau menyangkal versi perayu-perayu. Untuk membuktikan atau menyangkal versi perayu-perayu, pihak pendakwaan mesti memanggil Ang untuk memberikannya peluang untuk mematahkan dan menafikan yang dia adalah penghuni unit pangasapuri tersebut. Jika dipanggal, Ang juga dapat mematahkan pertalian bahawa dadah yang dijumpai di dalam unit pangsapuri tersebut adalah miliknya. Mengambil kira dari pespektif ini, kegagalan pihak pendakwaan untuk memanggil Ang adalah serius (lihat perenggan 44).

(3) Chew adalah saksi penting. Dia adalah penyewa unit pangsapuri berdasarkan perjanjian sewa. Harus diingat bahawa perayu pertama memberi keterangan bahawa Ang telah memperkenalkan Chew kepadanya sekali semasa di unit pangsapuri tersebut. Oleh itu, adalah penting bagi pihak pendakwaan untuk memanggil Chew atau menawarkan Chew kepada pembelaan. Ini tidak dibuat dan ia telah jelas mengkompromi kes pihak pendakwaan (lihat perenggan 55).

(4) Hakim Mahkamah Tinggi telah mengenakan beban yang lebih berat dari segi undang-undang sehingga menjejaskan dan tidak menguntungkan kedua-dua perayu. Dapatan hakim Mahkamah Tinggi yang bijaksana dikaitkan dengan keterangan yang dikemukakan oleh pihak pendakwaan menunjukkan bahawa kedua-dua perayu berada di dalam unit pangsapuri dan tindakan mereka untuk melarikan diri telah diberi penekanan. Tindakan melarikan diri, dalam konteks rayuan ini, jika betul, boleh ditafsirkan sebagai tindakan balas semula jadi kerana panik mengambil kira tiga das tembakan dilepaskan oleh pegawai polis dalam percubaan untuk memasuki unit pangsapuri tersebut (lihat perenggan 65–66).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

For cases on failure of prosecution to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3243–3255.

Cases referred to

Aedy Osman v PP [2011] 1 CLJ 273, FC (refd)

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Ang Kian Chai v PP & Another Appeal [2012] MLJU 158; [2012] 4 MLRA 456, CA (refd)

Anwar Hussain and another v The State AIR 1952 Assam 47, HC (refd)

Azizan bin Yahaya v PP [2013] 1 MLJ 180; [2012] 8 CLJ 405, CA (refd)

Burhanuddin bin Benjamil lwn Pendakwa Raya [2013] MLJU 255; [2013] 1 LNS 149, CA (folld)

Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 2 AMR 1135, SC (refd)

Harihar Chakravarty v State of West Bengal AIR 1954 SC 266, SC (refd)

Ibrahim Mohamad & Ors lwn PP [2011] 4 CLJ 113, FC (refd)

Lee Ngin Kiat v PP [1993] 1 SLR (R) 695, CA (refd)

Mat v PP [1963] 1 MLJ 263 (refd)

PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)

PP v Ng Teck Hong & Anor [1990] 2 CLJ (Rep) 780 (refd)

PP v Phon Nam [1988] 3 MLJ 415, SC (refd)

PP v Rosyatimah bte Neza & Anor [1989] 1 MLJ 360, HC (refd)

Ramli bin Kechik v PP [1986] 2 MLJ 33, SC (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (refd)
Yee Wen Chin v PP [2008] 6 MLJ 222; [2008] 6 CLJ 773, CA (folld)
Yoong Hock Pin v PP [1977] 1 MLJ 178, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Criminal Procedure Code ss 158, 159, 162, 425
Dangerous Drugs Act 1952 ss 37(b), 37A(1)(b)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 45–19 of 2005 (High Court, Pulau Pinang)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Munahlyza bt Mustafa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] Both the appellants were tried before the Penang High Court for three charges of trafficking in dangerous drugs. The three charges were worded as follows:

First charge

Bahawa kamu bersama-sama pada 7 Oktober 2003, jam lebih kurang 4.45 petang, di alamat No: C-27–09, E Park Kondo, Jalan Batu Uban, Georgetown, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, dengan niat bersama telah memperedarkan dadah berbahaya iaitu 691.8g (395.8g Heroin dan 296g Monoacetylmorphines), dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama yang dibaca bersama s 34 Kanun Keseksaan.

Second charge

Bahawa kamu bersama-sama pada 7 Oktober 2003, jam lebih kurang 4.45 petang, di alamat No: C-27–09, E Park Kondo, Jalan Batu Uban, Georgetown, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, dengan niat bersama telah memperedarkan dadah berbahaya iaitu 972.3g Ketamine, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama yang dibaca bersama s 34

Kanun Keseksaan.

Third charge

Bahawa kamu bersama-sama pada 7 Oktober 2003, jam lebih kurang 4.45 petang, di alamat No: C-27–09, E Park Kondo, Jalan Batu Uban, Georgetown, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, dengan niat bersama telah memperedarkan dadah berbahaya iaitu 52.8g Methamphetamine, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama yang dibaca bersama s 34 Kanun Keseksaan.

[2] At the end of the prosecution's case, the learned High Court judge amended the second charge to one of possession. The notes of evidence at pp 310–311 of the appeal record at *Jilid* 3 carried this caption:

Mahkamah: Keputusan di akhir kes pendakwaan. Mahkamah bacakan keputusan ringkas di akhir kes pendakwaan. Kes prima facie dibuktikan. OKT-OKT diperintah bela diri di atas pertuduhan pertama, pertuduhan kedua pindaan bagi pertuduhan di bawah s 12(2) dan seksyen 12(3) ADB dan pertuduhan ketiga.

[3] At the end of the defence case, the learned High Court found both the appellants guilty in respect of all the three charges and sentenced them to death. But the second charge was amended to one of possession. This is one of the unsatisfactory features of this appeal. At p 356 of the appeal record at *Jilid* 3, the notes of evidence recorded the following passages:

Keputusan: OKT1 dan OKT2 didapati bersalah ke atas ketiga-tiga pertuduhan dan disabitkan. OKT1 dan OKT2 dihukum mati mandatory dan digantung di leher sehingga mati seperti yang diperuntukkan di bawah seksyen 277 KAJ.

[4] It is germane to mention that when the second charge was amended to possession, the appeal records do not show that the amended charge was read and the plea taken by the learned High Court judge. The appeal records do not show that the appellants were allowed to recall or re-summon and examine witnesses who may have been examined, in breach of s 162 of the Criminal Procedure Code ('CPC') which enacts as follows:

Recall of witnesses when charge altered

162 Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

[5] According to the case of *Anwar Hussain and another v The State* AIR 1952 Assam 47, the denial of the right to recall or re-examine a witness vitiates the trial and it is incurable.

[6] It goes without saying that all courts have the jurisdiction to alter or add to any charge framed before judgment is pronounced, provided the provisions of s 158 of the CPC are complied with. The jurisdiction to alter a charge or add a new charge as envisaged in s 158 of the CPC is exercisable when there is material before the court to justify it (*Harihar Chakravarty v State of West Bengal* AIR 1954 SC 266). Section 158 of the CPC enacts as follows:

> Court may alter or add to charge
>
> 158(1) Any Court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

[7] It is the trial court and not the appellate court who has the jurisdiction to alter a charge or add a new charge before judgment is pronounced. According to the Federal Court in *Yoong Hock Pin v Public Prosecutor* [1977] 1 MLJ 178, it was not competent for the learned Judge on appeal to amend the charge. But the position in the Republic of Singapore is different where the Court in *Lee Ngin Kiat v Public Prosecutor* [1993] 1 SLR (R) 695 (CA) held that the appellate court has the jurisdiction to alter or add a new charge. However, all is not lost. Section 60 of the Courts of Judicature Act 1964 empowers the Court of Appeal to 'make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial Court might have exercised.'

[8] The learned High Court judge also breached s 159 of the CPC. That section provides that if the charge is altered or added, the court can proceed to hear the case after taking the plea from the accused person, provided it does not, in the opinion of the court, prejudice the accused in his defence or the prosecution in the conduct of the case.

[9] The learned High Court judge acknowledged the mistake which he made and implored this court to review, rectify, and put it right. At p 125 of the appeal record at *Jilid* 1, by way of a 'Postscript', His Lordship had this to say:

> (154) Mahkamah ini ingin menjelaskan bahawa terdapat kesilapan di dalam penghukuman bagi pertuduhan kedua setelah penghakiman kes dibacakan. Bagi Pertuduhan Pertama dan Pertuduhan Ketiga adalah merupakan hukuman mandatori dan ianya tiada pindaan seperti yang telah diputuskan dan dijatuhkan. Bagaimanapun bagi pertuduhan kedua ianya hendaklah merujuk kepada pertuduhan kedua pindaan seperti yang telah dipinda oleh mahkamah ini di akhir

kes pendakwaan yang membawa hukuman di bawah seksyen 12(3) Akta Dadah Berbahaya, 1952 dan dengan itu kesalahan dan sabitan ke atas Tertuduh Pertama dan Tertuduh Kedua bagi pertuduhan kedua adalah dimaksudkan bagi Pertuduhan Kedua Pindaan bagi milikan (possession) 972.3g Ketamine yang membawa hukuman maksima lima tahun penjaraan. Oleh itu hukuman bagi Pertuduhan Kedua ke atas tertuduh pertama dan tertuduh kedua hendaklah disemak di peringkat rayuan dan digantikan dengan hukuman di bawah seksyen 12(3) Akta seperti yang telah dipinda oleh mahkamah bagi Pertuduhan Kedua Pindaan tersebut.

[10] This means that the appeal in regard to the second charge must be allowed and we were urged to make that order accordingly.

[11] We will now proceed to the heart of the matter.

THE CASE FOR THE PROSECUTION

[12] We can do no better than to begin by narrating the evidence of ASP Ahmad Radzi Ahmad ('SP7') the raiding officer and the leader of the raiding party. Within a narrow compass, SP7 testified along the following lines. That on 7 October 2003, SP7 led a police party to the condominium unit at No 9 on the 27th floor of E Park Kondo situated along the road as mentioned in the first and third charges. Upon arrival, SP7 and his men observed the condominium unit for approximately 45 minutes. At about 4.45pm, SP7 ordered his police personnel to forcibly enter the condominium unit by cutting the grill door and by opening the wooden door with the aid of a *door buster*. SP7 and his police personnel succeeded in gaining entry and, once inside, SP7 noticed that there was no one inside the condominium unit. SP7 then proceeded to the front room and he found that it was locked. SP7 then fired three shots at the door knob, applied pressure, and forced it open. The door was opened but no one was inside. SP7 and his police personnel then proceeded to the back rooms through a passage. At this juncture, SP7 saw two male Chinese, later identified as the appellants, running towards one of the back rooms. This room was described by SP7 as the second room. SP7 instructed his police personnel to arrest the appellants. According to SP7, the first appellant put up a struggle and was slightly injured on the forehead while the second appellant was arrested whilst being under the bed.

[13] After both the appellants were arrested, SP7 cautioned them orally, in simple Malay language that was easy to understand, pursuant to s 37A(1)(b) of the Dangerous Drugs Act 1952 ('DDA').

[14] In the presence of both the appellants, a search was conducted in the kitchen area. That search led to the recovery of some illegal items from the

kitchen cabinets but these illegal items were insignificant and they bore no relevance to the charges against both the appellants.

[15] Still accompanied by both the appellants, the master bedroom was next to be searched. According to SP7, the master bedroom had no furniture and on the floor, there was an assortment of *paraphernalia* for drugs processing suspected to be heroin. Inside the the master bedroom, there was a smaller room separated only by a wooden sliding door. It is inside this smaller room that SP7 also found various types of drugs and equipment. SP7 seized all the items found from the master bedroom and the smaller room and he listed them down in the search list as reflected in exh 'P87' at pp 425–427 of the appeal record at *Jilid* 3.

[16] The various items found in the master bedroom are listed in exh 'P87' at p 426 of the appeal record at *Jilid* 3 under caption 'Dalam Bilek Utama'. And the learned High Court judge in his grounds of judgment reproduced the various items found in the master bedroom at p 19 of the appeal record at *Jilid* 1 in this manner in its original text:

(a) dua bungkusan kertas putih (P59 dan P61) mengandungi serbuk disyaki heroin nombor 3 dengan anggaran berat 1,675 gram;

(b) sebuah besen steel (P68) mengandungi serbuk disyaki heroin nombor 3 yang sedang dimasak. Anggaran berat 1,080 gram;

(c) sebuah dapur gas jenama 'Golden Fuji' model GF8000 (P29);

(d) satu senduk kayu (P68A);

(e) sebuah besen steel kosong (P69);

(f) satu sudip kayu (P69A);

(g) sebuah besen plastik warna merah (P66) mengandungi serbuk disyaki heroin nombor 3 dalam proses campuran. Anggaran berat serbuk ialah 6,170 gram;

(h) sebuah kipas angin jenama 'KDK';

(i) sebuah alat impulse sealer jenama 'Brother' (P31);

(j) sebuah dapur gas warna kuning jenama 'Pensonic'; dan

(k) sebuah mesin penimbang jenama 'Tanita' model 1144 (P30).

[17] While the various items seized from the smaller room are listed in the search list in exh 'P87' at p 426 of the appeal record at *Jilid* 3 under caption 'Dalam Bilek Kecil Tepi Tandas Bilek Utama' and spilling over to p 427 thereto.

The learned High Court judge reproduced the various items seized from the smaller room in his grounds of judgment at pp 19–20 of the appeal record at *Jilid* 1 in its original text in this way:

(i) tiga bungkusan plastik mengandungi 12 tin berbentuk cylinder gas jenama 'City Flame' (P33(1-4), P34(1-4), P35(1-4);

(ii) satu bungkusan plastik mengandungi empat tin cylinder gas jenama 'Butane Fuel Catridge' (P36(1-4);

(iii) satu bungkusan plastik lutsinar mengandungi serbuk disyaki 'Kafein'. Anggaran berat 50 kg. (P65);

(iv) sebuah besen plastik warna biru (P67) berisi 3 botol besar cecair (P70, P71 dan P72) dan 2 botol kecil cecair (P73 dan P74) berisi cecair chloroform serta empat botol plastik asid hydrochloric (P74, P75, P76 dan P77); dan

(v) satu beg plastik kuning jenama 'Pensonic' (P44) berisi 1 kotak (P45) di dalamnya berisi 1 bungkusan surat khabar (P46) mengandungi serbuk disyaki dadah ectacy. Anggaran berat 540g. Satu bungkusan plastik lutsinar (P48) disyaki serbuk 'ketamin'. Anggaran berat 614 gram. Satu plastik hitam (P51) mengandungi 30 paket plastik lutsinar (P52(1–30)) disyaki pil ectacy warna merah dan 1 plastik hitam (P54) mengandungi 22 paket plastik lutsinar (P55(1–22) disyaki pil ectacy warna biru (jumlah keseluruhan pil ialah 5,200 biji).

[18] SP7 further testified that the drugs in the steel basin were being cooked as the steel basin was placed on the gas stove which was turned on. According to SP7, all the seized items were then taken to 'Ibu Pejabat Kontinjen' ('IPK') at Pulau Pinang.

[19] The evidence of the other prosecution witnesses supported the version advanced by SP7.

[20] In due course, the exhibits were sent to the government chemist by the name of Hj Shaharudin bin Hasan (SP6) for analysis and he confirmed them to be dangerous drugs within the meaning of the DDA and thus formed the subject matter of the charges.

THE DEFENCE OF BOTH THE APPELLANTS

[21] The versions advanced by both the appellants tallied with one another. They called Ahmad Khadri bin Ramli ('DW3') and Mohd Fardhi bin Ahmad ('DW4') to support their versions pertaining to the existence of an individual by the name of Ang Kim Hock ('Ang').

[22] Both the appellants testified that they were friends and that they went to

the condominium unit together on that fateful day. Both of them knew Ang, a bookie, and that the first appellant knew Ang for about 20 years.

[23] Both the appellants and Ang came from the same kampung. The first appellant testified that they accepted Ang's invitation and went to the condominium unit. Both the appellants arrived at the condominium unit at about 3.45pm At that time, Ang was alone and he opened the door of the condominium unit to allow both the appellants to get inside. All the three of them then started to chit-chat in the hall of the said condominium unit.

[24] Both the appellants testified that a short while later, Ang received a telephone call. Ang informed both the appellants that he had to quickly leave to collect a debt and asked both the appellants to wait for him for a short while.

[25] After Ang left the condominium unit, both the appellants remained in the hall watching television. They also chatted with one another while watching television and this went on for about ten minutes. They became tired and decided to rest in the second room.

[26] The first appellant testified that there were two single beds and one double bed in the second room. While both the appellants were in the second room, they heard sounds of the main door to the condominium unit being forced open. They then heard three or four sounds of explosions. Both of them became frightened and they decided to take cover. At that juncture, both the appellants saw armed men rushing into the second room. The armed men assaulted the first appellant and he was injured on his forehead.

[27] Both the appellants were arrested and they were taken to the master bedroom where they were informed that drugs were recovered. They were then taken to the car park by the police personnel. At the car park, both the appellants saw Ang who was in handcuffs.

[28] Both the appellants denied any connection with the drugs found in the condominium unit.

[29] The first appellant testified that the condominium unit were rented by an individual by the name of Chew Leong Ming ('Chew'). According to the first appellant, prior to that fateful day, he had been to the condominium unit on two or three occasions. And on one such occasion Ang had introduced Chew to him.

[30] In essence, the defence of both the appellants was quite simple. They said that they were mere visitors to the condominium unit and had absolutely

nothing to do with the drugs in the condominium unit. The tenor of the defence of both the appellants showed that the traffickers were Ang and Chew.

ANALYSIS

[31] Before us, two main issues were raised and they may be stated as follows:

(a) that the learned High Court judge failed to appreciate that the prosecution's failure to call or offer Ang and Chew has compromised the case for the prosecution; and

(b) that the learned High Court judge erred in failing to sufficiently consider the defence case.

THE FIRST ISSUE

[32] Both the appellants submitted through their learned defence counsel that the failure on the part of the prosecution to call or offer Ang has seriously compromised the case for the prosecution. It was submitted that Ang was the occupier of the condominium unit and it was Ang who had invited both the appellants to the condominium unit on that fateful day. This particular line of defence was put to SP7 as seen at pp 240–241 of the appeal record at *Jilid* 2. For convenience, the material parts of SP7's evidence are now reproduced:

S : Saya katakan penghuni flat tersebut pada masa serbuan adalah seorang lelaki Cina yang bernama Ang Kim Hock I/C No: 690401-07-5347?

J : Tidak setuju.

S : Saya katakan lelaki Cina ini Ang Kim Hock yang telah lebih kurang 3.30-3.45 petang pada 7 Oktober 2003 yang menjemput kawannya OKT1 dan OKT2 memasuki flat C27-09?

J : Saya tidak pasti.

S : Saya katakan OKT1 dan OKT2 menunggu kawan mereka Ang Kim Hock untuk kembali ke flat tersebut bila pasukan polis serbu masuk ke flat tersebut?

J : Tidak setuju.

S : Adakah awak tahu pada masa dan hari pada sebelah petang hari yang sama lelaki ini Ang Kim Hock telah ditangkap di E-Park Condo?

J : Saya tidak pasti.

S : Saya katakan Ang Kim Hock ini telah ditahan 60 hari sebelum dia dihantar ke Detention Centre di Muar?

J : Saya tidak pasti.

S : Lepas ditahan di Muar, dihantar pula ke Batu Gajah kerana ditahan kerana libatkan diri dengan dadah?

J : Saya tidak pasti.

[33] Chief Inspector Tee Ah Chew ('SP9'), the investigating officer of the case, was cross-examined in regard to Ang being the occupier of the condominium unit and that Ang was also arrested on that fateful day. This line of cross-examination of SP9 can be seen at p 295 of the appeal record at *Jilid* 2:

S : Saya katakan penghuni flat itu adalah seorang lelaki Cina yang bernama Ang Kim Hock?

J : Tidak tahu.

S : Saya katakan Ang Kim Hock ini juga telah ditangkap pada petang yang sama seperti OKT1 dan OKT2 berkaitan kes dadah di E-Park Condo?

J : Tidak tahu.

[34] Continuing at p 296 of the appeal record at *Jilid* 2, SP9 was asked the following question and he gave a straight forward answer. We will now reproduce that brief exchange:

S : Sebagai IO awak boleh dengan maklumat ini mengesan jika Ang ini telah ditangkap berkaitan pengedaran dadah di E-Park Condo pada hari yang sama?

J : Saya boleh kesan tangkapan tersebut.

[35] It is not disputed that Ang existed. That Ang is a real person and not a fictitious character can never be disputed. DW3 and DW4 were called by both the appellants. These defence witnesses added mileage to the appellants' defence and gave it a touch of credibility. Both DW3 and DW4 testified that Ang was a real person and that, at the material time, Ang was under preventive detention for his involvement in drugs.

[36] DW3 was the Ketua Inspektor Penjara of Pusat Pemulihan Akhlak ('PPA') Muar. He gave evidence and tendered the detention order and the allegation of facts dated 5 December 2003 which were marked as exhs 'D89A' at pp 431–432 of the appeal record at *Jilid* 3 and 'D89B' at p 433 of the appeal record at *Jilid* 3 respectively.

[37] It is pertinent to note that SP9 was also cross-examined to show that

Ang was sent to PPA Muar after being detained for sixty days. This can be seen at p 295 of the appeal record at *Jilid* 2:

> S : Ang telah ditahan 60 hari sebelum dihantar ke PPA Muar?
>
> J : Tidak tahu.

[38] DW4 testified that, at the material time, he was with the Home Affairs Ministry and he confirmed that two detention orders were issued against Ang and he produced and tendered the detention order and allegations of facts dated 5 December 2003 as per exhs 'D90A' and 'D90B' at p 436 of the appeal record at *Jilid* 3.

[39] At pp 343–344 of the appeal record at *Jilid* 3, DW4 testified in examination-in-chief that the date 7 October 2003 as referred to in exh 'D89B' at p 433 of the appeal record at *Jilid* 3 would usually refer to the date where the detainee was arrested. In its original text, this was what DW4 testified in examination-in-chief at pp 343–44 of the appeal record at *Jilid* 3:

> Tarikh 7 Oktober 2003 yang terdapat di para (1) adalah tarikh yang saya dapatkan dari laporan polis yang KDN terima. Saya tidak ingat jika tarikh 7 Oktober 2003 itu adalah tarikh Ang Kim Hock ditangkap. Adalah kebiasaan yang disebutkan dalam pengataan fakta alasan tahanan adalah tarikh orang tahanan itu ditangkap.

[40] It must be recalled that the date 7 October 2003 was the day where both the appellants were arrested. It corroborated the appellants' version that Ang was also arrested on that very day. And it is this aspect of the case that the learned High Court judge failed to appreciate. His Lordship was bound to objectively view the whole case from all angles so that both the appellants have a fair chance of being acquitted (per Edgar Joseph Jr SCJ in *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 p 144 (MLJ); [1993] 2 AMR 1135 (SC), at p 1141 (AMR)).

[41] The appellants' version in regard to Ang was rather simple. That Ang as the occupier of the condominium unit had invited both the appellants to the condominium unit as visitors. That being the case, Ang is the trafficker. It is trite law that the prosecution, in order to establish its case beyond reasonable doubt, must proceed to disprove or negate the defence version. It is ideal to refer to the Federal Court case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 to support this proposition. There, Edgar Joseph Jr FCJ (as he then was) delivering the judgment of the court had this to say at p 719:

> To resume our discussion regarding the important point of misdirection as regards the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the judge to have criticised the defence for having

failed to put to the investigating officer, the name of Che Mat or the latter's telephone number or his place of abode, for the simple reason that these particulars had been disclosed in the cautioned statement of the appellant made the day after his arrest so that the police had all the time in the world to check their veracity. That being the case, the onus was on the prosecution, to check on whether the appellant's version of the facts as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts. The defence were, therefore, under no duty to put the matters aforesaid to the investigating officer having regard to their prior disclosure in the cautioned statement. In holding to the contrary, the Judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed.

[42] This would be followed by the case of *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649, a decision of Augustine Paul J (later FCJ). There His Lordship aptly said at p 731 (MLJ); p 676 (CLJ) of the report:

As the prosecution has failed to negate the suggestions made by the defence in the course of its case it may still rebut the defence advanced by cross-examination of the accused and his witnesses and/or, if possible, by calling Yee Chin Koon as a witness or tendering his police statement in evidence by re-opening its case at the end of the case for the defence.

[43] James Foong FCJ in *Aedy Osman v Public Prosecutor* [2011] 1 CLJ 273, at p 283, writing for the Federal Court expressed the same sentiments:

From the authorities cited by the appellant's counsel, it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof.

[44] In order to disprove or negate the appellants' version, the prosecution must call Ang to afford him the opportunity to rebut and deny that he was the occupier of the condominium unit. If called, Ang too would be able to break the nexus that the drugs found in the condominium unit belonged to him. Viewed from these perspectives, the omission by the prosecution to call Ang to the witness box was fatal.

[45] No evidence was led to show that Ang could not be traced. In fact, no attempts were ever made to trace and locate Ang. That being the case, it is right to say that the prosecution offered no response to rebut or disprove the appellants' version about Ang.

[46] In our judgment, this is a classic case where the prosecution failed to call

a material witness in the person of Ang. There is no impediment for the prosecution to call Ang bearing in mind that the defence had already put to SP7 and SP9 about the importance of Ang to the factual matrix of the case. The prosecution was alerted that Ang figured prominently in the defence case. Thus, in order to disprove or negate the defence version, the prosecution has no choice but to call Ang in order to establish its case beyond reasonable doubt.

[47] Even at the defence stage, the prosecution can still call Ang as a rebuttal witness provided it can show 'that the suggested defences were of minimal, doubtful or marginal value' (to borrow the words of Augustine Paul J (later FCJ) in *Public Prosecutor v Chia Leong Foo* at p 678). Be that as it may, the failure or omission to call Ang attracted the adverse inference under s 114(g) of the Evidence Act 1950 and it has also prejudiced the defence. To compound the matter further, the failure to call Ang breached the famous rule in *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433, and it has also created a gap in the prosecution's case.

[48] The defence applied to recall DW4 in order to establish when and where Ang was arrested but the learned High Court judge refused to accede to the defence application. This point was taken up before us as a basis to argue that there was procedural unfairness on the part of the learned High Court judge in rejecting the defence application to recall DW4. Learned counsel having conduct of the matter before the High Court gave the reason for wanting to recall DW4 and this can be seen at p 345 of the appeal record at *Jilid* 3:

> Dato' Sitham : Saya ingin recall DW4 untuk bawa rekod untuk tunjukkan maklumat tentang tarikh, tempat dan masa tangkapan Ang Kim Hock.
>
> Mahkamah : Permohonan pembelaan ditolak.

[49] The learned High Court judge did not give any reasons for dismissing the defence application to recall DW4. However, in examination-in-chief, DW4 testified at pp 343–344 of the appeal record at *Jilid* 3 to the following effect:

> Jika saya ada rekod penuh saya akan dapat berikan tarikh dan tempat Ang Kim Hock ditangkap. Maklumat ini ada dalam laporan polis yang polis hantar ke KDN. Bagi perintah tahanan kedua saya keluarkan pada 7 Disember 2005 untuk tempoh selama dua tahun.

[50] It is quite plain that DW4 had the relevant information and was in a position to provide the exact date and place where Ang was arrested. Thus, the application to recall DW4 was not frivolous. If the application to recall DW4

was allowed, the information about Ang would certainly corroborate the appellants' story that Ang was arrested on the same day at the car park. With due respect, the learned High Court judge did not exercise his judicial discretion properly when he dismissed the application to recall DW4.

[51] Section 425 of the CPC gives a wide power to the court at any stage of inquiry, trial or other proceeding to summon, examine, and re-examine any person in attendance or those who have given evidence if their evidence is essential to the just decision of the case. Indeed Mohamed Azmi SCJ in *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 33 (SC) speaking for the Supreme Court laid down the threshold to apply s 425 of the CPC and that was whether the evidence to be adduced 'appears to it essential to the just decision of the case'.

[52] It must be emphasised that the discretion to recall a witness cannot be exercised arbitrarily. Rather, it should be exercised judiciously, failing which appellate interference is warranted (*Public Prosecutor v Phon Nam* [1988] 3 MLJ 415 (SC)).

[53] In approaching the issue pertaining to the failure of the prosecution to call or offer Ang, we are guided by the approach suggested by Gopal Sri Ram JCA (as he then was) in *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222; [2008] 6 CLJ 773 (CA), at p 233 (MLJ); pp 784–785 (CLJ); of the report. There His Lordship had this to say:

> In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 (SC). That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the Radhi direction and must be administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538; [1995] 3 CLJ 371(CA).

[54] The learned High Court judge did not apply the above mentioned guidelines in handling the issue of Ang. Instead, His Lordship speculated on many matters pertaining to Ang and asked questions which only Ang could

answer. The following examples would suffice:

(a) at p 118 of the appeal record at *Jilid* 1, the learned High Court judge asked why Ang left the appellants in the condominium unit and never came back even after 45 minutes which would allow the appellants to see the drugs in the master bedroom and that would expose Ang's activities;

(b) at p 119 of the appeal record at *Jilid* 1, the learned High Court judge said that just because it was not put to the prosecution that Ang had changed clothes, it would mean that Ang had gone out with the same clothes when he was processing drugs in the second room;

(c) at p 119 of the appeal record at *Jilid* 1, the learned High Court judge commented that the appellants showed no reaction or failed to inform SP7 and Chief Inspector Mazli bin Abd Aziz ('SP8') about the arrest of Ang at the car park;

(d) at p 121 of the appeal record at *Jilid* 1, the learned High Court judge surmised that if Ang had locked the doors, it would be more logical if Ang had only locked the wooden door; and

(e) at p 122 of the appeal record at *Jilid* 1, the learned High Court judge concluded that Ang was not the occupier of the condominium unit.

[55] We will now consider the failure of the prosecution in not calling Chew. It cannot be denied that Chew is an important witness. He was the tenant of the condominium unit based on the tenancy agreement (exh 'P9') as seen at pp 396–403 of the appeal record at *Jilid* 3 that was produced by the prosecution. It must be recalled that the first appellant testified that Ang had introduced Chew to him once at the condominium unit. Thus, it is incumbent on the part of the prosecution to call Chew or to offer Chew to the defence. This was not done and it has seriously compromised the case for the prosecution.

[56] Since Chew was the tenant of the condominium unit, s 37(b) of the DDA should be invoked against him. That section reads as follows:

> Presumptions
>
> 37 In all proceedings under this Act or any regulation made thereunder —
>
> (b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises.

[57] As a tenant, Chew shall be deemed to have the 'care or management' of the condominium unit and he should be called by the prosecution or at least offered to the defence. Likewise, the accused persons in *Public Prosecutor v Ng*

Teck Hong & Anor [1990] 2 CLJ (Rep) 780 and in *Public Prosecutor v Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360 were tenants and the courts invoked the presumption under s 37(b) of the DDA and held that they were deemed to have the 'care or management' of the premises.

[58] The learned High Court judge declined to invoke the adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution for failing to call Chew as reflected at p 116 of the appeal record at *Jilid* 1. His Lordship advanced the following reasons for refusing to invoke the adverse inference:

(a) that according to SP9, there was no furniture in the condominium unit except for the bed and the mattress in the second room;

(b) that the defence did not suggest to the prosecution witnesses which room Chew occupied;

(c) that the defence did not suggest to the prosecution witnesses that Chew was in the condominium unit before SP7 and his police personnel raided the premises; and

(d) that the defence did not suggest to the prosecution witnesses that Chew had locked the condominium unit.

[59] But, with respect, the tenancy agreement in exh 'P9' provided the causal link between the condominium unit and Chew. Kok Chen Nam ('SP2'), the landlord of the condominium unit, did not testify that Chew was not the tenant. By reason of the presumption under s 37(b) of the DDA, the prosecution should call Chew so as to exclude Chew as having 'care and management' of the condominium unit and as the owner of the drugs. Unfortunately, this was not done. The failure to call Chew undermined the prosecution's case. The principle of exclusion found favour in a number of authorities. In *Ang Kian Chai v Public Prosecutor & Another Appeal* [2012] MLJU 158; [2012] 4 MLRA 456, Abdul Malik bin Ishak JCA writing for the Court of Appeal had this to say at p 461 of the report:

> (21) We are constrained to say, with respect, that the learned JC had gone off tangent and had completely misdirected herself when she held that the absence of Chen Jing had no consequence and that based on the evidence adduced it was sufficient to hold that the appellant had knowledge and control of the raw opium in the said house. Now, since the learned JC had earlier found that Chen Jing was a tenant and occupant of the said house and had free access to the entire house including the room where the raw opium was found by SP4, it can also be argued that Chen Jing too just like the appellant had knowledge, custody, control and possession of the raw opium in the said room.
>
> (22) Without putting Chen Jing to the stand and subjecting her to cross-examination, there is a wide gap in the prosecution's case. We acknowledge that the prosecution has the full and complete discretion to decide as to whether

Chen Jing should be called as a witness. But if the failure to call Chen Jing would undermine the prosecution's case and prevent the prosecution from proving its case beyond reasonable doubt, then the Court has no choice but to acquit the appellant (*Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433, (SC); and *Public Prosecutor v Asnawi bin Yusuf* [2011] 4 MLJ 16, (CA)).

[60] Aziah Ali JCA in *Azizan bin Yahaya v Public Prosecutor* [2013] 1 MLJ 180; [2012] 8 CLJ 405, writing for the Court of Appeal, expressed the same sentiments at p 187 (MLJ); p 413 (CLJ) of the report:

(9) We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the learned judge had failed to analyse or assess these testimonies. The prosecution had failed to discharge its bounden duty of excluding access to the appellant's room by others.

[61] Zulkefli Makinudin FCJ in *Ibrahim Mohamad & Ors lwn Public Prosecutor* [2011] 4 CLJ 113, writing for the Federal Court, applied the exclusion principle in this way at p 123 of the report:

(12) The Supreme Court in *Abdullah Zawawi* had therefore highlighted the danger of relying on a tip-off's case as there is a possibility that in such a situation the drugs may have been planted in order to implicate the accused. Hence the need for the prosecution to exclude the possibilities that other individuals may have access to the drugs in question. We find on a proper perusal of the evidence it would show that the prosecution had failed to exclude the possibility of others having access to the said vehicle. No evidence whatsoever was adduced by the prosecution to exclude the possibility that Zainuddin and/or other individuals had access to the vehicle prior to the date of arrest. This is further compounded when the courts below erroneously took the position that the failure to call Zainuddin is not fatal as he was not together with both the accused when they were arrested. We also noted even Zainuddin's statement that was taken from him was not adduced and tendered as evidence pursuant to s 32(1)(i) of the Evidence Act 1950 if at all for some valid reasons Zainuddin could not be called to give evidence.

[62] The principle of exclusion is now entrenched in our law. Equally important is to recognise the explanation by both the appellants that they were present in the condominium unit as visitors on the invitation of Ang. And the following findings of the learned High Court judge which were in favour of both the appellants must be considered and cannot be ignored:

(a) that the first appellant was fully clothed and it was not proved that the first appellant was only in his underpants was decided in favour of the first appellant (see p 108 of the appeal record at *Jilid* 1);

(b) that the fact that no keys to the condominium unit were found or seized was resolved in favour of both the appellants (see p 109 of the appeal record at *Jilid* 1);

(c) that the gas stove was not switched on was resolved in favour of both the appellants (see pp 111–113 of the appeal record at *Jilid* 1);

(d) that the learned High Court judge did not accept the prosecution's version that the fan and the impulse sealer were switched on and his Lordship made a finding that these items were located in the master bedroom of the condominium unit (see pp 113–114 of the appeal record at *Jilid* 1);

(e) pertaining to the hand swabs, the learned High Court judge had ruled, at the end of the prosecution's case, in favour of both the appellants, in that their hands could, based on the evidence of SP6, be contaminated (see p 66 of the appeal record at *Jilid* 1);

(f) in regard to the test fittings of the clothes on the first appellant, the learned High Court judge ruled that the evidence was inadmissible because no caution was administered (see p 69 of the appeal record at *Jilid* 1); and

(g) the learned High Court judge also held that both the appellants were not tenants of the condominium unit (see p 70 of the appeal record at *Jilid* 1).

THE SECOND ISSUE

[63] It concerned the failure of the learned High Court judge to sufficiently appreciate the defence of the appellants. In this context, there is a passage in the judgment of the learned High Court at p 107 of the appeal record at *Jilid* 1 that requires scrutiny. It reads as follows:

> Isu di hadapan Mahkamah adakah keterangan pembelaan tertuduh pertama dan tertuduh kedua itu boleh diberi kepercayaan dan jika sekiranya tidak boleh dipercayai adalah pembelaan kedua-dua tertuduh itu mempunyai kemungkinan sebagai benar (*Mat v Public Prosecutor*).

[64] The above passage is erroneous. It construed *Mat v Public Prosecutor* [1963] 1 MLJ 263 wrongly. With respect, *Mat v Public Prosecutor* did not say that the defence story even if it cannot be believed must be likely to be true. In misconstruing *Mat v Public Prosecutor*, the learned High Court judge had imposed a higher burden in law to the detriment and disadvantage of both the appellants.

[65] The findings of the learned High Court judge as alluded to earlier

coupled with the available evidence adduced by the prosecution showed that both the appellants were present in the condominium unit and their damning conduct of flight was highlighted. In their defence, both the appellants testified that they were present in the condominium unit on that fateful day as visitors — on the invitation of Ang. On hearing three or four explosions, both the appellants became frightened and decided to take cover. Now, the conduct of flight was challenged. SP7 conceded that he never identified himself or called the occupants of the condominium unit to open the door before he instructed his police personnel to force open the door. At p 232 of the appeal record at *Jilid* 2, in his cross-examination this was what SP7 said:

S : Adakah awak sebelum memotong grill atau memecah pintu hadapan memanggil penghuni rumah berkenaan?

J : Saya tidak ada memanggil penghuni rumah berkenaan.

S : Adakah awak menjerit polis, buka pintu sebelum memotong pintu dan potong grill?

J : Saya juga tak ada menjerit polis.

S : Jadi bila sampai di hadapan unit apartment berkenaan awak terus beri arahan untuk potong grill dan pecah pintu kayu di hadapan?

J : Ya, benar.

[66] In our judgment, the conduct of flight, in the context of the present appeal, even if true, can be construed as a natural reaction of pure panic bearing in mind that three or four shots were fired by the police personnel in an attempt to gain entry into the condominium unit.

[67] Mohd Zawawi Salleh JCA in *Burhanuddin bin Benjamil lwn Pendakwa Raya* [2013] MLJU 255; [2013] 1 LNS 149 resolved the issue of flight in favour of the defence as the arresting officer did not identify himself to the accused before the arrest was effected. We gratefully applied His Lordship's decision in deciding the present appeal before us.

[68] In regard to the presence of both the appellants at the condominium unit on that fateful day, we gratefully adopted the passage in the judgment of Edgar Jospeh Jr SCJ, when His Lordship in delivering the grounds of judgment of the court in *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 (SC), aptly said at p 142:

> We need hardly add, that even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well.

[69] In open court, we announced our decision. It went like this:

> We have deliberated at great length and we are of the view that it is not safe to convict both the appellants. Consequently, we allow the appeals of both the appellants. The convictions and death sentences are hereby set aside. Both the appellants are acquitted and discharged.

[70] We restored freedom to both the appellants.

Appeal allowed.

Reported by Afiq Mohamad Noor